

Nos. 1-12-0389 and 1-12-0390 (consolidated)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	Nos. 10 CR 21371 &
)	10 CR 21372
QUARNELIUS RILEY,)	
)	Honorable
Defendant-Appellant.)	James B. Linn,
)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court, with opinion.
Presiding Justice Hyman and Justice Neville concurred in the judgment and opinion.

ORDER

- ¶ 1 *HELD:* Prohibition in aggravated unlawful use of a weapon statute prohibiting public possession of a firearm without a FOID card held constitutional. Two of defendant's convictions vacated under one-act, one-crime rule.
- ¶ 2 Defendant Quarnelius Riley was charged by two separate indictments with six counts of attempted first degree murder, one count of aggravated battery with a firearm, two counts of aggravated discharge of a firearm, one count of aggravated assault, two counts of aggravated

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unlawful use of a weapon, and one count of unlawful possession of a firearm and firearm ammunition. Following a bench trial, the trial court directed a verdict in favor of Riley on the six counts of attempted first degree murder, but convicted Riley on the remaining counts. The court sentenced Riley to 14 years in prison for aggravated battery with a firearm; 4 years each on the counts of aggravated discharge of a firearm, to run concurrently; and 3 years each for the remaining four counts, to run concurrently with the 18 years.

¶ 3 On appeal, Riley contends that sections 24-1.6 (720 ILCS 5/24-1.6 (West 2010)), and 24-3.1(a)(1) (720 ILCS 5/24-3.1(a)(1) (West 2010)), of the Criminal Code of 2012 (Code), both of which criminalize the possession of a firearm under certain circumstances, violate the right to bear arms under the Illinois and U.S. Constitutions. In the alternative, Riley argues that his convictions on two counts of aggravated unlawful use of a weapon and one count of unlawful possession of a handgun arose out of the same act, and thus two of those convictions must be vacated pursuant to the one-act, one-crime rule. For the reasons that follow, we reject Riley's constitutional arguments, but vacate his convictions on the count of unlawful possession of a firearm and one count of aggravated unlawful use of a weapon pursuant to the one-act, one-crime rule.

¶ 4 BACKGROUND

¶ 5 On the night of November 16, 2010, Karsheara Johnson and her cousin, Daniell Norman, left her house to meet a mutual friend, Julian Sanchez, at the bus stop near 66th Street and Western Avenue in Chicago, Illinois. On their way to the bus stop, they saw three black men on the other side of the street. After the bus arrived, and as Johnson, Norman and Sanchez were

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making their way back to Johnson's house, the three men began walking towards them. One of the men said "BOCO killer."¹ Norman responded that none of them were BOCO, but the men accused Norman of lying and, indicating Sanchez, said "he must be BOCO."

¶ 6 One of the three men then took out a gun and began shooting. Before fleeing the scene, Johnson and Norman were able to see the shooter, who they identified in court as Riley.

Sanchez, who did not see the shooter, was shot as he ran from the gunfire. Johnson, Norman and Sanchez eventually returned to Johnson's house. When police arrived, both Johnson and Norman were taken separately to the location of the shooting where Riley was being detained. There, Johnson and Norman identified Riley as the gunman.

¶ 7 Chicago police officer Gregory Barnes and his partner, Officer Michael Mette, were called to investigate a disturbance at the 6600 block of Claremont Avenue on November 16. Upon their arrival, the officers saw three black men running westbound, one of whom was Riley. The officers gave chase to Riley, who was holding his waistband. Officer Barnes testified that as he came within five to ten feet of Riley, Riley took out a revolver and pointed it at him. Barnes ordered Riley to drop the gun as he withdrew his own firearm and fired one round. Riley stopped, fell to the ground, and dropped his weapon, whereupon Barnes handcuffed him. Riley's handgun contained six spent shell casings.

¶ 8 Detective James Gilger was assigned to investigate the incident. He interviewed Riley in the early hours of November 17, 2010, with Detective Keith Olson. The detectives gave Riley

¹ "BOCO" is an acronym for the Bell Oakley Claremont Community Organization, a street gang.

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Miranda warnings and Riley agreed to answer their questions. Initially, Riley denied that he was the shooter, but then gave an oral statement admitting to the shooting. This statement was later memorialized in writing in the presence of Assistant State's Attorney Molly Riordan.

¶ 9 Riley's statement revealed that he was 17 years old and lived with his aunt. Three days prior to the shooting, he had been walking to his uncle's house when a passenger in an approaching car yelled "BOCO" and shot at him approximately four times. Riley did not tell the police, but instead proceeded to his uncle's house. On November 16, Riley went to the area of 66th Street and Claremont Avenue because he believed this was where BOCO members congregated. Riley brought a gun with him to this location, which he carried in his pocket. Riley saw three people walking on Claremont towards 67th Street, and because he believed they were BOCO members, he yelled "BOCO killer" and shot at them. Riley fired his gun until no bullets remained.

¶ 10 At trial, the State introduced a certificate indicating that Riley had never been issued a firearm owners' identification (FOID) card. The parties also stipulated to the accuracy of the results of a gunshot residue test that revealed that Riley discharged a firearm.

¶ 11 At the conclusion of the State's case, the defense moved for a directed finding, which the trial court granted with respect to the six counts of attempted first degree murder. The defense then rested. The trial court convicted Riley on the remaining charges and sentenced him to a total of 18 years in prison: 14 years on the count of aggravated battery with a firearm; 4 years each on the two counts of aggravated discharge of a firearm, to run concurrently with each other but consecutive to the 14 years; and 3 years each for one count of aggravated assault, two counts

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of aggravated unlawful use of a weapon, and one count of unlawful possession of a firearm and firearm ammunition, to run concurrently with the 18 years. Riley's motion to reconsider his sentence was denied.

¶ 12 Riley timely appealed his convictions for aggravated unlawful use of a weapon (section 24-1.6 of the Code) and unlawful possession of a firearm (section 24-3.1 of the Code). After briefing was completed, the Illinois Supreme Court issued its decision in *People v. Aguilar*, 2013 IL 112116, which addressed the constitutionality of sections 24-1.6(a)(1), (a)(3)(A) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), and 24-3.1(a)(1) (720 ILCS 5/24-3.1(a)(1) (West 2010)), of the Code. The parties filed supplemental briefs addressing the impact of the court's decision in *Aguilar* on Riley's convictions.

¶ 13 ANALYSIS

¶ 14 As the issue is dispositive, we first address the constitutionality of subsection (a)(1)(3)(C) of the aggravated unlawful use of a weapon statute under which Riley was convicted, which reads as follows:²

¶ 15 "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or person except when on his or her land or in his or her abode or fixed place of business *** any pistol, revolver, stun gun or taser or other firearm ***

² In his supplemental brief, Riley abandons his contention that section 24-3.1(a)(1) is unconstitutional in light of the holding to the contrary in *Aguilar*, 2013 IL 112116, ¶ 28.

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and

(3) One of the following factors is present:

(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card; 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010).³

Although Riley also contests the constitutionality of subsection (a)(1)(3)(I), which prohibits persons under the age of 21 from possessing handguns, given our ruling on the first question presented, we need not and, in fact, should not reach this issue. See Illinois Supreme Court Rule 18 (eff. Sept. 1, 2006) ("A court shall not find unconstitutional a statute * * * unless: * * * (4)[] the finding of unconstitutionality is necessary to the decision or judgment rendered and [] such decision cannot rest upon an alternative ground[.]")

¶ 16 Equally as important for purposes of this appeal is the statutory subsection under which Riley was *not* convicted – section 24-1.6(a)(1), (a)(3)(A), which categorically bans the possession of a firearm that is "uncased, loaded and immediately accessible at the time of the offense" outside of one's home, land or business. It is this subsection that the Seventh Circuit (in

³ This statute was amended earlier this year, but the amended version is not at issue in this case. We do note, however, that the recently enacted Firearm Concealed Carry Act (Pub. Act 98-63 (eff. July 9, 2013) (adding 430 ILCS 66/1 *et seq.*)), which *inter alia*, amended the AUUW statute, retains the restriction relating to FOID cards, thus evidencing the legislature's belief that even after *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), such restrictions on the possession of firearms are reasonable. See 5 ILCS 70/2 (West 2012); *Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 455, 458 (1997) ("[I]n amending a statute, the legislature is presumed to have been aware of judicial decisions interpreting the statute and to have acted with this knowledge.").

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Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012)), and the Illinois Supreme Court (in *Aguilar*, 2013 IL 112116, ¶ 22), agree is unconstitutional under the second amendment.

¶ 17 In his opening brief, Riley initially acknowledges that his convictions for aggravated unlawful use of a weapon were premised on the fact that he had not been issued a FOID card (subsection (a)(3)(C)), and that he was under 21 years old (subsection (a)(3)(I)). However, throughout the remainder of his brief, he proceeds to argue as though he was convicted under subsection (a)(3)(A), and at one point incorrectly states that he was found guilty of carrying " 'on or about his person, a firearm, at a time when he was not on his own land or in his own abode or fixed place of business, and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense.' " As a result of this mis-characterization, Riley generally challenges the constitutionality of the statutory language criminalizing the possession of a loaded, uncased, and accessible handgun outside of one's abode, legal dwelling or fixed place of business. He also argues against the constitutionality of section 24-1.6(a)(1). But this section, standing alone, is only one element of the offense of aggravated unlawful use of a weapon (see 720 ILCS 5/24-1.6 (West 2010)); in order to be convicted, one of the factors outlined in subsection (a)(3) must also be present (720 ILCS 5/24-1.6(a)(3) (West 2010)).

¶ 18 Riley waits until his supplemental brief to argue that the subsection (a)(3) factors under which he was convicted – lack of a FOID card and under the age of 21 – were, on their face, unconstitutional restrictions on the right to bear arms. Because Riley did not raise these arguments in his initial brief to this court, they are waived. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued [in opening brief] are waived"). However, the waiver rule is an

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admonition to the parties rather than a limitation on the court, and where the interests of justice require, we may look beyond it. *Halpin v. Schultz*, 234 Ill. 2d 381, 390 (2009). Given the important constitutional issues presented by this appeal, we address the merits of Riley's arguments.

¶ 19 In his supplemental brief, Riley asks us to extend the decision in *Aguilar* to hold that the subsections of the aggravated unlawful use of a weapon statute under which was convicted, namely, carrying a handgun outside of his home, land or business while under the age of 21 and without a FOID card, are facially unconstitutional.⁴ This presents a question of law subject to *de novo* review. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 227 (2010).

¶ 20 This court recently addressed post-*Aguilar* issues regarding the constitutionality of subsections of the AUUW statute other than the unconditional ban on the possession of loaded firearms outside the home. In *People v. Henderson*, 2013 IL App (1st) 113294, the defendant was convicted under both section 24-1.6(a)(1), (a)(3)(A), the provision at issue in *Aguilar*, and section 24-1.6(a)(2), (a)(3)(C), relating to defendant's failure to possess a valid FOID card. Defendant was sentenced only on the (a)(3)(A) violation and, based on *Aguilar*, this court reversed that conviction. *Id.* at ¶ 12. Noting that the offense of possession of a firearm without a valid FOID card was unaffected by *Aguilar*, this court in *Henderson* further found that subsection

⁴ Although Riley was under the age of 18 when he carried the firearm and there is no evidence that he ever applied for a FOID card, he nevertheless has standing to challenge the constitutionality of sections 24-1.6(a)(1), (a)(3)(C) and (a)(3)(I) on their face. See *Aguilar*, 2013 IL 112116, ¶ 12 (quoting *People v. Mayberry*, 63 Ill. 2d 1, 8 (1976) ("One has standing to challenge the validity of a statute if he has sustained or if he is in immediate danger of sustaining some direct injury as a result of enforcement of the statute.")).

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(a)(3)(C) was severable from those provisions of the AUUW statute found unconstitutional. *Id.* at ¶ 22. Concluding that the provision of the AUUW statute requiring possession of a valid FOID card withstood defendant's constitutional challenge, the court remanded the case for sentencing on the FOID card conviction. *Id.* at ¶ 36. On the same date *Henderson* was decided, this court also decided *People v. Taylor*, 2013 IL App (1st) 110166, and reached the same conclusion. We agree with the decisions in *Henderson* and *Taylor* and, therefore, find that *Aguilar* does not warrant reversal of Riley's conviction for failure to possess a valid FOID card. As noted above, because we find that Riley's conviction under subsection (a)(3)(C) must be upheld, we need not address Riley's arguments regarding the constitutionality of subsection (a)(3)(I).

¶ 21 Our rejection of Riley's arguments regarding the unconstitutionality of subsection (a)(3)(C) of the aggravated unlawful use of a weapon statute does not end our inquiry into the validity of his convictions. Riley contends that regardless of whether the aggravated unlawful use of a weapon and unlawful possession of a firearm statutes are constitutional, two of his three convictions under these statutes must be vacated under the "one-act, one-crime" rule, which prohibits multiple convictions carved from precisely the same physical act. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) (citing *King*, 66 Ill. 2d at 566). Where a defendant is convicted of more than one offense based on the same act, the convictions for the less serious offenses must be vacated. *People v. Lee*, 218 Ill. 2d 219, 226-27 (2004). Although Riley forfeited review of this issue by failing to present it in a motion to reconsider his sentence, we review for plain error because the error affects substantial rights. *Harvey*, 211 Ill. 2d at 389.

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¶ 22 The State concedes, and we agree, that Riley's convictions for two counts of aggravated unlawful use of a weapon and one count of unlawful possession of a firearm did in fact arise out of the same physical act: his possession of a handgun on the night of November 16, 2010.

Therefore, we vacate his conviction for unlawful possession of a weapon, the less serious offense (*People v. Johnson*, 237 Ill. 2d 81, 99 (2010)), and his conviction on one count of aggravated unlawful use of a weapon. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), we instruct the circuit clerk to amend the mittimus to reflect that the conviction and sentence for unlawful possession of a weapon and one count of aggravated unlawful use of a weapon are vacated.

¶ 23 CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court's judgment on a single count of aggravated unlawful use of a weapon, but vacate Riley's convictions for unlawful use of a weapon and one count of aggravated unlawful use of a weapon.

¶ 25 Affirmed in part and vacated in part; mittimus corrected.